Supreme Court, U. S.
FILED
NOV 14 1978
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

November Term, 1978

No. 78-799

BUCKINGHAM TOWNSHIP BOARD OF SUPERVISORS,

Petitioners,

v.

HERBERT BARNESS, IRMA BARNESS, JOSEPH A. CICCONE, NORMA J. CICCONE, JOHN F. ENDERS, JR., & DELLA ENDERS, his wife, JOHN F. ENDERS, JR., DELLA E. ENDERS and WILLIAM J. SHEDDEN, JR., ROBERT H. YAROSCHUK, K. PATRICIA YAROSCHUK, CLAUDE J. SCHLANGER and DONALD GREENBERG, BENJAMIN SEIDMAN, HERBERT BURNSTEIN, DR. ALVIN SMITH, and ALVIN NEINBERG, Individuals t/a FAIRWAY-SMITH ASSOCIATES,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

OLAN B. LOWREY
1719 North Broad Street
Philadelphia, Pa. 19122

Attorney for Petitioners

IN THE COURT OF COMMON PLEAS
OF BUCKS COUNTY
CIVIL ACTION - LAW

CLAUDE J. SCHLANGER	:	
vs.	:	No. 75-2561-08-5
BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP	:	ZONING APPEAL
JOHN F. & DELLA ENDERS, JR.	:	No. 75-2562-08-5
vs.	:	ZONING APPEAL
BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP	:	
JOHN F. ENDERS, JR. and DELLA E. ENDERS, his wife, and WILLIAM J. SHEDDEN, JR.	:	No. 75-2563-08-5
vs.	:	ZONING APPEAL
BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP	:	
HERBERT & IRMA BARNESS	:	No. 75-2993-08-5
vs.	:	ZONING APPEAL
BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP	:	

JOSEPH A. & NORMA J. CICCONE, his wife	:	No. 75-2994-08-5
vs.	:	ZONING APPEAL
BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP	:	
ROBERT H. YAROSCHUK and K. PATRICIA YAROSCHUK	:	No. 75-3053-08-5
vs.	:	ZONING APPEAL
BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP	:	
DONALD GREENBERG, BENJAMIN SEIDMAN, HERBERT BURNSTEIN, DR. ALVIN SMITH and ALVIN NEINBERG, Individuals t/a FAIRWAY-SMITH ASSOCIATES	:	No. 75-4715-08-5
vs.	:	ZONING APPEAL
BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP	:	

INTERVENORS

Commonwealth of Pennsylvania, Department of Environmental Resources

Buckingham Township Planning Commission

Manoff et al

Land Use Task Force

Bucks County Planning Commission (amicus)

BEFORE MONROE, P.J., LUDWIG, WALSH, JJ.

OPINION AND ORDER

Owners of seven tracts of land comprising approximately 5% of the total township area have appealed to this court from the refusal of the governing body of Buckingham Township to adopt their curative amendments to its zoning ordinance of 1951. All but one of the challengers seek to construct multi-family dwellings, apartments, townhouses, or other forms of cluster housing. At the time when the challenges[1] were filed, the lands of all applicants were zoned for single-family detached homes on lots of not less than one acre. They have averred that the ordinance was unconstitutionally exclusionary under the rule of Girsh[2] and kindred cases in that none of the stated housing types was permitted anywhere in the Township.

[1]Municipalities Planning Code, Act of June 1, 1972, P.L. _____ No. 93 §1004, 53 P.S. 11004.

[2]Girsh Appeal, 437 Pa. 237 (1970).

The remaining applicant, Fairway-Smith Associates, seeks to establish a mobile home park zoning district. Its challenge rests on the expressed prohibition in the 1951 ordinance against this type of housing arrangement. Bush Bros., Inc. vs. East Pikeland Township, 13 Commonwealth Ct. 578 (1974).

The Township appears to acknowledge that the challenged ordinance was unconstitutionally exclusionary and we so find. The controversy centers on the significance of a new ordinance which was adopted in the year following the institution of the challenges. All parties are in accord that the issues are as follows:

> (1) Whether the new ordinance of March 6, 1975, was pending in the constitutional sense on the dates the curative amendment applications were filed.
>
> (2) If not pending, was the new ordinance an effective cure of the defects in the 1951 ordinance?
>
> (3) Whether the applicants' proposals are reasonable and not injurious to the public health, safety, welfare and morals.

An ordinance is pending in the constitutional sense when the governing body has resolved to consider a particular scheme of rezoning and has advertised to the public its intention to hold public hearings on the rezoning.[3] The events preceding the adoption of an ordinance must be examined whenever the issue of pendency is raised. The following sequence of events occurred in the instant cases:

> June 27, 1972 and January 30, 1973: As a prelude to revision of the 1951 ordinance, the Township contracted with the county planning commission for a revised Township comprehensive plan.
>
> December 1973 and January 17, 1974: Public meetings by Township planning commission to consider the new comprehensive plan.

[3] Casey v. Zoning Hearing Board, 459 Pa. 219, 328 A.2d 464 (1974). Boron Oil Co. v. Kimple, 445 Pa. 327, 284 A.2d 744 (1971).

Curative amendment applications:

March 7, 1974	Schlanger (incomplete)
March 22, 1974	Barness
March 28, 1974	Ciccone
April 3, 1974	Yaroschuk
April 3, 1974	Schlanger (amended)
April 9, 1974	Enders
April 9, 1974	Enders-Shedden
July 25, 1974	Fairway-Smith

March 26, 1974 and April 10, 1974: Advertisement and adoption of new comprehensive plan. Contract with county planning commission for preparation of a new zoning ordinance.

April 10, 1974 to December 1974: Various public meetings of Township planning commission culminating in submission of the proposed zoning ordinance to the governing body.

June 1974 to March 19, 1975: Hearings on the curative amendment applications.

December 26, 1974, January 2, 1975: Advertisements by governing body of public

meeting for January 9, 1975, to consider new zoning ordinance.

March 6, 1975: Enactment of zoning ordinance. Re-enacted January 1976, to correct procedural defect in enactment.

April 10, 1975 and April 17, 1975: Rejection of curative amendment applications, and readoption of new ordinance as cure.

Both sides to the controversy have advanced divergent views on the question of whether the foregoing events are sufficient to meet the pendency test. The applicants contend that nothing short of an advertisement by the Township of the proposed ordinance prior to the filing of the challenges will suffice. The Township, on the other hand, urges the broader view that this court may find a sufficient public declaration of an intent to rezone the entire Township by considering the full gamut of the activities of the various

public bodies involved in the rezoning process, beginning with the signing of a contract with the county planning commission for a revised comprehensive plan some two years prior to the institution of the challenges. In support of its view, the Township points to the publicity given to the planning activities in the press and the participation by interested citizens in the months before the curative amendment applications were filed.

At least seven recent appellate decisions are available to guide us in resolving the issue. Of course each case turns on its own facts. The ordinance was held to be pending where - prior to the application - the planning (zoning) commission advertised the proposed ordinance and made it available for public inspection, and the ordinance was adopted after the date of the application.[4] The

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[4]Boron Oil Co., supra. Bucks County Housing Dev. Corp. v. Plumstead, ___ Pa. Commonwealth Ct. ___, 361 A.2d 447 (1976).

ordinance was held not to be pending where the governing body resolved - prior to the application date - to consider an amendment at a public hearing and the public hearing was not advertised until after the application was filed;[5] where a challenge was filed and a proposal to amend was referred to the planning commission on the same day, and the amendment was advertised three weeks later;[6] where the township advertised an amendment and tabled it indefinitely prior to the date of the challenge;[7] where the only significant activity prior to the date of the challenge was advertisement by the planning commission of a hearing on revisions of the comprehensive plan providing for new multi-family zoning classifications;[8] where the

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[5]Mutzig vs. Hatboro, 440 Pa. 455 (1970).

[6]Casey v. Z.H.B., supra.

[7]Appeal of FPA Corp. ___ Pa. Commonwealth Ct. ___, 360 A.2d 851 (1976).

[8]Perlstein v. Borough of Monroeville, ___ Pa. Commonwealth Ct. ___, 361 A.2d 510 (1976).

municipality had been considering an amendment to its zoning ordinance for over a year prior to the filing of the challenge, but did not advertise a public hearing on the amendment until after the application was filed.[9]

We see in the foregoing decisions a consistent intent of the appellate courts that an ordinance will be considered pending only where it has been publicly advertised prior to the date of challenge and is ultimately enacted without substantial change. The new Buckingham Township ordinance was not advertised until several months after the challenges were filed. While it is true, as the Township states, that the comprehensive plan is the foundation on which zoning ordinances are constructed, the Commonwealth Court has rejected the concept that the one is tantamount to the other in the context of this issue. The distinction is made that the comprehensive plan is recommendatory, not

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[9]Northampton Township v. G.R.S.H., Inc. 14 Commonwealth Ct. 364 (1974).

mandatory. F.P.A., supra; Perlstein, supra. We are constrained to hold that the ordinance of 1975 was not pending on the dates any of the challenges was instituted. This brings us to the question of whether, as the Township contends, the ordinance of 1975 should be considered as an effective cure of the defects in the earlier ordinance.

In Casey, supra, the Supreme Court stated its recognition that a successful challenger should not be frustrated by a retributory township. In that case the new zoning ordinance which was enacted after the challenge was instituted cured the constitutional infirmity, but failed to include the challenger's land in the provision for multi-family housing, the lack of which had been the basis of the challenge. In Ellick[10] the challenge was denied by the Township's failure to act within the time allowed by the M.P.C., and the Township did not enact any curative amendment of its own.

[10]Ellick v. Worcester Township, 17 Commcnwealth Ct. 404 (1975).

There the Commonwealth Court stated "We do not decide in this case what happens if the governing body adopts a curative amendment different from the one which was proposed by the landowner." The Township in the cases before us reasons that its new ordinance must be recognized as a valid cure if its purpose and effect was not to zone around the applicants. In support of its position, it relies on the decision of our court in Carr vs. New Britain Township, 28 Bucks Co. L.Rep. 108 (1975), which is presently on appeal to the Commonwealth Court. In that case the applicant challenged the validity of an ordinance which prohibited any expansion of non-conforming uses and submitted a curative amendment allowing expansion "to whatever extent appropriate to accommodate the natural growth and expansion of such non-conforming use." The Township responded with an amendatory ordinance allowing 50% expansion. On appeal to this court, a three-judge panel ruled that

> "The only logical interpretation of Article X of the MPC is that if a landowner proposes a curative amendment and the governing body either rejects it or takes no action on it then on appeal the original ordinance must stand on its own feet. But where a challenge is made, a cure demanded, and a cure is received, then on appeal the only true issue before the court is the reasonableness of the ordinance as cured."

In Dublin Properties vs. Upper Dublin Township, 21 Pa. Commonwealth Ct. 54, 342 A.2d 821 (1975), the applicant filed a curative amendment to build townhouses, and the challenge was upheld. The Commonwealth Court added:

> "The Township is apparently considering an amendment which will permit townhouses and thus cure the defect in the ordinance. Zoning amendments pending after the filing of a challenge, however, are not applicable to the challenging landowner's case (citing Casey)."

The Dublin decision does not appear to have come to the attention of counsel and this court at the time Carr was argued and decided. In view of the quoted statement in Dublin a doubt is raised that our court's conclusion in Carr will be held to be correct. We think the import of Dublin is

that we must look not to the ordinance of 1975 but to Section 1011 of the MPC[11] which imposes broad duties on the court to formulate judicial relief.

This section provides in part:

> "(1)...
>
> (2) If the court finds that...a decision or order thereunder which has been brought up for review unlawfully prevents or restricts a development or use which has been described by the landowner through plans and other materials...it may order the described development or use approved as to all elements or it may order it approved as to some elements and refer other elements to the governing body...for further proceedings, including the adoption of alternative restrictions, in accordance with the court's opinion and order."

The appellate courts have stated at length guidelines to implement Section 1011.[12] Having successfully challenged the old ordinance, the applicants are entitled to proceed with their proposed developments subject to reasonable

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[11] Act of 1972, June 1, P.L. ___ No. 93, §1011, 53 P.S. §11011.

[12] Casey, supra. Ellick, supra. Kaufman & Broad vs. Supervisors, 20 Commonwealth Ct. 116 (1975).

restrictions to protect the public health, safety, welfare and morals. We will refer all elements of the proposals to the Board of Supervisors in order that this body may restudy them in the existing record and formulate reasonable restrictions which will be subject to review in this court.

We urge the applicants and the Township to enter meaningful negotiations with a view toward resolving their differences. It is hoped that at the very least such negotiations will narrow the areas of conflict.

Some of the applicants have protested the ground rules imposed by the Board whereby combined hearings were held. We agree with the Board that the enormity of its task required this method. More than 2500 pages of testimony were compiled in 20 hearings over a nine-month period. We are satisfied that all applicants were given reasonable opportunities to be heard. In In (sic) the event that it may become necessary to review further action of the governing body, we will consider

each appeal individually.

ORDER

AND NOW, this 27th day of October, 1976, the appellants' zoning challenges are sustained and the records are remanded to the board of supervisors for further proceedings and review not inconsistent with this opinion. Jurisdiction of the appeals is retained during the pendency of such further proceedings.

BY THE COURT,

Arthur B. Walsh, Jr., J.

NOTE: Judge Ludwig did not participate.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP, LAND USE TASK FORCE, and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, Appellants	:	CONSOLIDATED APPEALS
	:	DOCKET NOS.
	:	1941 C.D. 1976
		1942 C.D. 1976
	:	1943 C.D. 1976
		1944 C.D. 1976
v.	:	1945 C.D. 1976
		1946 C.D. 1976
HERBERT and IRMA BARNESS, his wife; JOSEPH A. and NORMA J. CICCONE, his wife; JOHN F., JR. and DELLA E. ENDERS, his wife, and WILLIAM J. SHEDDEN, JR.; DONALD GREENBERG, BENJAMIN SEDMAN, HERBERT BURNSTEIN, DR. ALVIN SMITH, ALVIN NEINBURG, Individuals t/a FAIRWAY-SMITH ASSOCIATES; CLAUDE J. SCHLANGER; and ROBERT H. YAROSCHUK and PATRICIA YAROSCHUK, his wife Appellees	:	1947 C.D. 1976
		1977 C.D. 1976
	:	1978 C.D. 1976
		1979 C.D. 1976
	:	1980 C.D. 1976
		1981 C.D. 1976
	:	1982 C.D. 1976
		1983 C.D. 1976
	:	2083 C.D. 1976
		2084 C.D. 1976
	:	2085 C.D. 1976
		2086 C.D. 1976
	:	2087 C.D. 1976
		2088 C.D. 1976
	:	2089 C.D. 1976

O R D E R

AND NOW, this 25th day of January, 1978, the Order of the court below dated October 27, 1976 is affirmed.

Theodore O. Rogers, J.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP, LAND USE TASK FORCE, and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, Appellants	:	CONSOLIDATED APPEALS
	:	DOCKET NOS.
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HERBERT AND IRMA BARNESS, his wife; JOSEPH A. and NORMA J. CICCONE, his wife; JOHN F., JR. and DELLA E. ENDERS, his wife, and WILLIAM J. SHEDDEN, JR.; DONALD GREENBERG, BENJAMIN SEDMAN, HERBERT BURNSTEIN, DR. ALVIN SMITH, ALVIN NEINBURG, Individuals t/a FAIRWAY-SMITH ASSOCIATES; CLAUDE J. SCHLANGER; and ROBERT H. YAROSCHUK and PATRICIA YAROSCHUK, his wife Appellees		1947 C.D. 1976
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	:	1983 C.D. 1976
		2083 C.D. 1976
		2084 C.D. 1976
		2085 C.D. 1976
	:	2086 C.D. 1976
		2087 C.D. 1976
		2088 C.D. 1976
		2089 C.D. 1976

BEFORE:

HONORABLE JAMES S. BOWMAN, President Judge
HONORABLE JAMES C. CRUMLISH, JR., Judge
HONORABLE ROY WILKINSON, JR., Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge

ARGUED: OCTOBER 5, 1977 - PHILADELPHIA

O P I N I O N

OPINION BY JUDGE ROGERS FILED JANUARY 25, 1978

The Court of Common Pleas of Bucks County sustained the zoning appeals of seven owners of seven tracts of land in Buckingham Township from the action of the township supervisors dismissing the landowners' challenges to the validity of the township zoning ordinance and refusing their requests for curative amendments.[1] The landowners challenged the validity of the zoning ordinance on the ground that it forbade any new residential development other than the construction of single-family dwelling houses on lots not smaller, and in some districts considerably larger, than 10,000 square feet. This was indeed what the Buckingham Township zoning ordinance provided in the months of March, April and July 1974 when the landowners filed their challenges and requests for curative amendment; it was what the ordinance had provided

from the time of its enactment in 1951; and it continued to be what the ordinance provided until March 6, 1975, almost a year after the first of these challenges was submitted to the supervisors. The zoning ordinance thus clearly prevented the construction of apartments and townhouses proposed by six of the landowners and of mobile home parks proposed by the seventh. The court below concluded that the ordinance was unconstitutionally exclusionary on the authority of Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970), and East Pikeland Township v. Bush Brothers, Inc., 13 Pa. Commonwealth Ct. 578, 319 A.2d 701 (1974), where ordinances which prohibited the use of land for, respectively apartment houses and mobile home parks, were invalidated. We add to those cases Camp Hill Development Company, Inc. v. Zoning Board of Adjustment of Dauphin, 13 Pa. Commonwealth Ct. 519, 319 A.2d 197 (1974), in which we decided that an ordinance prohibiting townhouses was bad on the same grounds. The court below remanded the record

to the board of supervisors for further proceedings,[2] retaining jurisdiction.

Appeals from the order below have been taken by the Township of Buckingham and two intervenors below, the Land Use Task Force, a local landowners group, and the Commonwealth's Department of Environmental Resources.[3] We have allowed the filing of briefs by amicus curiae Bucks County and its Planning Commission, and by Philadelphia Chapter, American Institute of Planners, both supporting the appellants. The cases have been consolidated here as they were below.

Unfortunately for the appellants, all of the law, some of it developed while these cases were being litigated below, is against them. As noted, the township zoning ordinance excluded apartment, townhouse, and mobile home park use, all judicially declared to be legitimate residential uses in the cases hereinabove cited. This showing

by the landowners overcame the presumption of the zoning ordinance's validity and cast the burden on the township of presenting evidence that its prohibitions bore a substantial relationship to health, safety and the general welfare. The appellants' efforts in this regard were not unusual to this class of case and differed only in immaterial detail from those ineffectively made as early as in Girsh Appeal, supra, and as late as in In Re: Application of Friday, Pa. Commonwealth Ct. , A.2d (Nos. 158 C.D. 1977 and 303 C.D. 1977, filed January 9, 1978). Neither the inconvenience to present inhabitants occasioned by increased use of existing public facilities, nor the expense to the public of creating new facilities, nor the certain change of the character of the community, singly or in combination, have ever been held to constitute threats to health, safety and the general welfare, justifying the outlawing of multi-family uses. Indeed, the essence of Girsh Appeal,

supra, and the cases extending its holding to residential uses other than apartments is that the denial to newcomers of a comfortable place to live by refusing to provide for multi-housing uses, is constitutionally impermissible, despite the inevitable effect on the community of an expanding population. The expectation is that the deleterious effects of development can and should be avoided by prompt and effective use of the broad planning and zoning authority placed in the hands of municipalities.

Buckingham Township and the Department of Environmental Resources, however, inveigh against the lower court's grant of definitive relief to the appellants. They say that persons who have successfully challenged an exclusionary zoning ordinance should not have a right to proceed with the development they proposed when they made their zoning application. A first answer to this contention is that there would appear to be no purpose to the requirement of Section 1004(c) of the

MPC, 53 P.S. §11004(c), that requests for curative amendments be accompanied by plans and materials describing the proposed use, if the only result of the proceedings was to be a judicial declaration concerning the validity or invalidity of the ordinance. A second and conclusive answer is that the Supreme Court has siad in the clearest possible language that landowners successful in this kind of litigation must have relief.

> "Finally, we must determine whether a court has the power to grant an applicant-challenger definitive relief upon rendering a zoning ordinance constitutionally inform. The appellee seeks a building permit for the erection of multi-family dwellings on his tract of land located in Warwick Township. This Court, pursuant to its disposition of the petition for enforcement of our order in Girsh Appeal has implicitly held that courts in this Commonwealth have this power. 'Obviously, if judicial review of local zoning action is to result in anything more than a farce, the courts must be prepared to go beyond mere invalidation and grant definitive relief.' To forsake a challenger's reasonable development plans after all the time, effort and capital invested in such a challenge is grossly inequitable." Casey v. Zoning Hearing Board of Warwick Township, 459 Pa. 219, 230, 328 A.2d 464 (1974).

We do not see how this language could be clearer or how the rule could be otherwise. It is true that Casey, supra, was not begun by request for curative amendment pursuant to Section 1004. However, Nicholas Heim & Kissinger v. Township of Harris, Pa. Commonwealth Ct. , 375 A.2d 1383 (1977), and In Re: Application of Friday, supra, were Section 1004 cases, in which definitive relief was provided to successful challengers.

All of the appellants contend that the appellees should have lost because all of the appellees knew that a new comprehensive plan for Buckingham Township was in preparation before they filed their challenges and because indeed an advertisement of a notice that the adoption of the new comprehensive plan appeared before all except one of the seven zoning challenges was filed. The appellants say that we should decide that this was sufficient notice of the pendency of curative zoning legislation. This thesis flies in the face of all cases in treating

the point. In In Re: Appeal of FPA Corporation, 25 Pa. Commonwealth Ct. 221, 225, 360 A.2d 851, 854 (1976), we wrote:

> "The Comprehensive Plan was advertised for adoption prior to FPA's filing. It is axiomatic, however, that comprehensive plans do not have the effect of zoning ordinances but only recommend land use which may or may not eventually be provided by a legally enforceable zoning ordinance."

In Perlstein v. Borough of Monroeville, 25 Pa. Commonwealth Ct. 489, 493, 361 A.2d 510, 512 (1976), we said:

> "A comprehensive plan is recommendatory, not mandatory . . . and the advertisement of amendments to the comprehensive plan is insufficient as a public notice of intention to rezone." (Citations omitted).

The zoning ordinance which it is said cured the invalidity of the regulations in existence since 1951 was not advertised until December 26, 1974, more than five months after the last of the seven challenges was filed and was not adopted until March 6, 1975.[4]

In Appeal of Carr, 30 Pa. Commonwealth Ct.

342, 346, 374 A.2d 735, 737 (1977), allocatur denied (Pa. Sept. 16, 1977), we said:

> "They (landowners) further contend that the court should pay no regard to any amendments enacted by the governing body which were not (adopted)[5] or not pending at the time the landowners' challenge was submitted pursuant to Section 1004 of the MPC. We agree with this proposition." (Footnote added).

The challenges and requests for curative amendments in this case preceded by many months the "'first sufficient public declaration' of an intent to amend the existing zoning ordinance."[6] They must therefore prevail and the appellees must, upon their compliance with other appropriate township regulations, be issued permits to do what their plans and other materials filed proposed.

The appellants vigorously represent that we should overrule the case law in this field in the interest of the public of Buckingham Township. They say that the appellees' projects should not be imposed on the township because the supervisors and other responsible officers were engaged in a

necessarily time-consuming task of planning what was required to bring the township regulations into conformity with the law. The argument is belied by the record. Girsh Appeal, supra, was decided, as we have noted, in 1970. Not until June 1972 did the township get around to considering a new comprehensive plan; not until April 1974 was the new comprehensive plan adopted; and finally, not until March 6, 1975 was a township zoning ordinance, which presumably conformed to the mandate of Girsh Appeal, adopted. It is too clear for serious argument to the contrary that there can be no justification for five years spent in curing an unconstitutional zoning ordinance. Indeed, by contrast, our researches in the record reveal an amendment to Buckingham Township's Zoning Ordinance adopted in 1970 reducing minimum lot size requirements in explicit response to the Supreme Court's holding in Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970) made earlier in the same year.

The appellants' contention that the

challenges should have been rejected be reason of the landowners' asserted bad faith in "racing" new township zoning regulations, is wholly without merit. Penn Township v. Yecko Bros., 420 Pa. 386, 217 A.2d 171 (1965), principally relied on, is without application. There the landowner sought to establish a lawful nonconforming commercial use by going into business after the public advertisement of a zoning amendment, that is, after the new regulation was pending. The Supreme Court further found that the record facts demonstrated a continued series of maneuvers by the landowner evidencing bad faith efforts to circumvent the "duly authorized" ordinance. Here, of course, there was no advertisement of a proposed new zoning regulation and the landowners were "racing" to avoid, if anything, the deleterious effects on their properties not of proposed controls, but of the continued lack of any controls by the township's failure to cure its invalid zoning ordinance.

Order Affirmed.

Theodore O. Rogers, J.

FOOTNOTES

1. Made pursuant to Section 1004(1)(b) of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §11004(1)(b).

2. We, as do the parties, understand that this order to require the issuance of building permits upon compliance by the landowners with all administrative requirements of the township zoning ordinance and other pertinent township regulations in existence when the zoning challenges were filed with the township.

3. A notice of the intervention of the Buckingham Township Planning Commission as of course was filed in the court below and the Planning Commission seems to have been treated as a party below. We point out that intervention as of course is permitted only to the municipality and the owner or tenant of land directly involved in the litigation. Section 1009 of the MPC, 53 P.S. §11009. The Planning Commission filed no appeal to this Court.

4. This ordinance was declared invalid from its inception by reason of procedural irregularities in its adoption in Large v. Buckingham Township, 27 Bucks 319 (1975). It was then reenacted.

5. In the text of our opinion as reported, the word which appears at this place is "corrected"; the word intended was "adopted".

6. This phrase if from Casey v. Zoning Hearing Board, supra, 459 Pa. at 226, 328 A.2d at 467.

Supreme Court of Pennsylvania

Eastern District

Sally Mrvos
Prothonotary

Catherine E. Lyden
Deputy Prothonotary

456 City Hall

Philadelphia, 19107

(215) 686-3581/84

August 16, 1978

Olan B. Lowrey, Esq.
1719 North Broad Street
Philadelphia, Pa. 19122

Re: Buckingham Township Board of Supervisors, et al. v. Herbert Barness, et al.
Petition of: Land Use Task Force
No. 3441 Allocatur Docket

Dear Mr. Lowrey:

This is to advise that the following Order has been endorsed on the Petition for Allowance of Appeal filed in the above-captioned matter:

"July 3, 1978

Petition denied

Per Curiam"

Very truly yours,

A - 3

/s/ Sally Mrvos

Sally Mrvos
Prothonotary

SM:ejh
cc: Thomas J. Oravetz, Esq.
Richard P. McBride, Esq.
John A. Van Luvanee, Esq.
Israel Packel, Esq.
Albert L. Blackman, Jr., Esq.

A - 3

NO. 3441 ALLOCATUR DOCKET

FOR PETITIONER:

Olan B. Lowrey
1719 North Broad Street
Philadelphia, Pa. 19122

BUCKINGHAM TOWNSHIP BOARD OF SUPERVISORS, LAND USE TASK FORCE, and COMMONWEALTH OF PENNSYLVANIA

v.

FOR RESPONDENT:

Thomas J. Oravetz
Deputy Attorney General
Commonwealth of Pennsylvania
Dept. of Environmental Resources
Suite 1200 - 1315 Walnut St.
Philadelphia, Pa. 19107

Richard P. McBride
Power, Bowen and Valimont
102 North Main Street
Doylestown, Pa. 18901

John A. Van Luvanee
Eastburn & Gray
Federal Savings Building
Doylestown, Pa. 18901

HERBERT BARNESS, IRMA BARNESS, JOSEPH A. CICCONE, NORMA J. CICCONE, JOHN F. ENDERS, JR., DELLA E. ENDERS, WILLIAM J. SHEDDEN, JR., ROBERT H. YAROSCHUK, K. PATRICIA YAROSCHUK, CLAUDE J. SCHLANGER, and DONALD GREENBERG, BENJAMIN SEIDMAN, HERBERT BURNSTEIN, DR. ALVIN SMITH, and ALVIN NEINBERG, Individuals t/a FAIRWAY-SMITH ASSOCIATES

PETITION OF: LAND USE TASK FORCE

For Amicus: Bd. Supervisors New Britain Twp.:
Albert L. Blackman, Jr.,

Hartzel and Bush
110 N. Main St.
Bucks County PO Box 7
Doylestown, Pa. 18901

February 24, 1978. Petition for Allowance of Appeal from Order of the Commonwealth Court at Nos. 1941-1946 C.D. 1976, 1977-1982 C.D. 1976, 2083-2088 C.D. 1976, filed.

March 13, 1978. Brief in Opposition on behalf of Herbert Barness, Irma Barness, Joseph A. Ciccone, Norma J. Ciccone, Robert H. Yaroschuk, K. Patricia Yaroschuk and Donald Greenberg, Benjamin Seidman, Herbert Burstein, Dr. Alvin Smith and Alvin Neinberg, individuals, t/a Fairway-Smith, Associates, filed by counsel, Richard P. McBride to Nos. 3438, 3441 and 3437 Allocatur Docket

March 13, 1978. Brief in Opposition on behalf of Claude J. Schlanger, John F. Enders, Jr., and Della E. Enders, his wife; John F. Enders, Jr. and Della E. Enders, his wife, and William J. Shedden,

Jr., filed by counsel John A. VanLuvanee to Nos. 3438, 3441 and 3437 Allocatur Docket.

May 10, 1978. Supplementary Petition for Allowance of Appeal by Amicus Curiae Bd. of Supervisors of New Britain Township, Bucks County, Pa. filed.

May 16. Motion to Quash Supplementary Petition filed.

May 17, 1978. Motion to Quash Supplementary Petition filed by John A. VanLuvanee, filed.

ORDER

July 3, 1978

Denied

Per Curiam

February 28, 1978. Wrote for Brief in Opposition (3).

C.P. Bucks Co.

Nos. 75-2561, 2562, 2563, 2993, 2994, 3053, 4715-08-5

March 14, 1978. Petition forwarded to Court with 3437 and 3438.

May 15, 1978. Supplementary Petition forwarded to Court.

May 16, 1978. Motion to Quash forwarded to Court.

May 17, 1978. Second Motion to Quash forwarded to Court.

August 16, 1978. Counsel advised of Order.

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

ROBERT B. SURRICK, Appellant	:	No. 541 January Term, 1974
v.	:	Appeal From the Order of the Commonwealth Court at No. 397 C.D. 1973, Affirming the Order of the Court of Common Please of Delaware County, Pennsylvania at No. 11932 of 1972
ZONING BOARD OF THE TOWNSHIP OF UPPER PROVIDENCE, et al. Appellees	:	

_O_P_I_N_I_O_N_

NIX, J. FILED: December 24, 1977

This is an appeal from an order of the Commonwealth Court, Surrick v. Zoning Hearing Bd. of Twp. of Upper Providence, 11 Pa. Commw. Ct. 607, 314 A.2d 565 (1974), affirming an order of the Court of Common Pleas of Delaware County which upheld the denial of appellant, Robert B. Surrick's, application for variance from the terms of the Zoning Ordinance of Upper Providence Township, Ordinance

No. 34 of 1952, as amended, by the Zoning Hearing Board (Board) of Upper Providence Township. (1) The dispositive issue is whether the township ordinance unconstitutionally excludes multi-family dwellings. The Commonwealth Court, in affirming the lower court's order, held that it did not. For the reasons set forth below, we disagree. (2)

The history and facts of this case are as follows. Appellant sought to build apartments and townshouses on a 16.25 acre tract of land (four acres owned by appellant; 12.25 acres under agreement of sale with zoning contingency). The tract is located in an area designated A-1 Residential under the township ordinance, which permits only single family dwellings on one-acre lots. Appellant initially had applied to the Board of Super-

(1) This Court's jurisdiction is based upon the Appellate Court Jurisdiction Act, Act of July 31, 1970, P.L. 673, No. 223, art. II, §204, 17 P.S. §211.204 (Supp. 1977-78).

(2) Since we find the ordinance to be unconstitutionally exclusionary, we need not reach the other issues raised by appellant.

visors of the Township to rezone the 12.25 acre tract to B-Business, the only ordinance classification permitting multi-family housing, to develope the site for apartments. The requested rezoning was denied after hearing held on September 2, 1971. Thereafter, appellant revised his plans to include the four acres of ground owned by him. He sought building permits, which were denied by the Building Inspector. An appeal was then taken to the Board requesting a variance and including a challenge to the constitutionality of the ordinance. The Board held hearings and subsequently denied the requested variance. It was this denial which ultimately resulted in the instant appeal.(3)

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(3) Pursuant to the statute as it then existed, the Board made no ruling on appellant's constitutional claims but did make the necessary findings of fact for the disposition of this issue. See Act of July 31, 1968, P.L. 805, art. IX, §910, 53 P.S. §10910 (1968).

This Section has subsequently been amended to provide:

> The board shall hear challenges to the validity of a zoning ordinance or map except as indicated in section 1003 and

Upper Providence Township is a western suburb of Philadelphia, located about 12 miles from the center of the city. Providence Road bisects the township along a roughly north-south axis, and Route 1, a limited access highway, intersects Providence Road cutting across the southern quarter of the township in a generally east-west direction (see Appendix for a map of the township). The 1970 census set the township's population at slightly over 9,200; the total acreage of the township is approximately 3,800 acres. Approximately one-quarter of the township land is undeveloped.

The zoning ordinance in question has classified 43 acres, or 1.14% of the total township

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> subsection (1) (b) of section 1004. In all such challenges, the board shall take evidence and made a record thereon as provided in section 908. At the conclusion of the hearing, the board shall decide all contested questions and shall make findings on all relevant issues of fact which shall become part of the record on appeal to the court.
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> Id., as amended, 1972, June 1, P.L. ___, No. 93, §910, effective in 60 days. (Footnotes omitted).

acreage, as a B district; in this B district apartments are permitted along with other essentially commerical uses, (4) and the record shows that the B district is already substantially developed.

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(4) The ordinance provides the following other uses in the B 1 zone:

2. Club, Fraternity house or lodge.

3. Educational, religious or philanthropic use, hospital, sanitarium or correctional institution.

4. Farm; greenhouse; municipal or recreational use; railway passenger station.

5. Store, personal service shop.

6. Office, bank, financial institution, telephone or telegraph business.

7. Place of amusement.

8. Hotel, restaurant, bakery, pastry, candy, confectionery or ice cream shop or factory.

9. Public garage; sales, service, and repair shop and gas filling and battery service station when authorized as a special exception by the Board of Adjustment in accordance with Sections 1100 to 1104 inclusive of this Ordinance.

10. Electrical shop; plumbing shop; paint store and paperhanger.

11. Tailoring, dressmaking, shoe repairing.

12. Jewelry, watches, clocks or optical goods.

Except for a three-block stretch of B district farther south in the township, most of the B district extends eight to ten blocks from the intersection of Sandy Bank Road and Providence Road north along Providence Road and ends at the intersection of Rose Tree Road and Providence Road. Appellant's tract is just north of this intersection. The width of this portion of the B district is 175 feet on either side of Providence Road (see Appendix).

Article I Section 1 of the Pennsylvania Constitution protects the citizen's right to the enjoyment of private property, and governmental inter-

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13. Undertaking and embalming.

14. Private or minor garage.

15. Accessory use on the same lot with and customarily incidental to any of the above permitted uses.

16. Any use of the same general character as any of the uses hereinbefore specifically permitted when authorized as a special exception by the Board of Adjustment in accordance with Sections 1100 to 1104 of this Ordinance.

Zoning Ordinance of Upper Providence Township, Ordinance No. 34 of 1952, as amended, art. VII, §701.

ference with this right is circumscribed by the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution. U.S. Const. amend. V, XIV; Pa. Const. art. 1, §1; Girsh Appeal, 437 Pa. 237, 241 n.3, 263 A.2d 395 ___ n.3 (1970). In reviewing zoning ordinances, this Court has stated that an ordinance must bear a substantial relationship to the health, safety, morals, or general welfare of the community. National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 522, 215 A.2d 597, ___ (1965), citing, inter alia, Glorioso Appeal, 413 Pa. 194, 196 A.2d 668 (1964). Thus, without expressly labelling it as such, this Court has employed a substantive due process analysis in reviewing zoning schemes and has concluded implicitly that exclusionary or unduly restrictive zoning techniques do not have the requisite substantial relationship to the public welfare. See Concord Twp. Appeal, 439 Pa. 466, 268 A.2d 765 (1970); Girsh Appeal, supra.

In Twp. of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975), this Court reaffirmed its conviction that suburban communities which find themselves in the path of urban-suburban growth cannot establish residential enclaves by excluding population growth.(5) Willistown in fact was no departure from precedent but merely a culmination of prior case law which had invalidated zoning techniques which seriously impeded or effectively "zoned out" population growth. See National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment, supra (invalidating a four acre lot minimum); Girsh Appeal, supra (invalidating a zoning ordinance which totally excluded apartments); Concord Twp. Appeal, supra (invalidating two and three acre lot minima).(6)

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(5) The Commonwealth Court decision in the instant case was handed down before our decision in Willistown.

(6) For a review of this Court's decisions in this area prior to Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970), see Comment, The Pennsylvania Supreme Court and Exclusionary Suburban Zoning: From Bilbar to Girsh - A Decade of Change, 16 Vill. L.Rev. 507 (1970).

In Willistown, this Court was confronted with a zoning ordinance amendment which permitted multi-family dwellings on 80 acres out of a total of 11,589 acres in the township. In striking down this land-use scheme as "tokenism" and thus exclusionary, we extended the prohibition in Girsh to include not only total exclusion of multi-family dwellings but also partial exclusion, or "selective admission." Twp. of Willistown v. Chesterdale Farms, Inc., 426 Pa. 455, 448-49, 341 A. 2d 466, 468 (1975). In so holding, we set forth the following rationale:

> "The implication of our decision in National Land is that communities must deal with the problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels. . . . "

Id., at 449, 341 A.2d at 468, quoting, Concord Twp. Appeal, 439 Pa. 466, 474, 268 A.2d 765, 768-69 (1970).

This Court's ruling in Willistown rested upon the premise of Girsh that where a municipal subdi-

vision "is a logical place for development to take place, it should not be heard to say that it will not bear its rightful part of the burden." Appeal of Girsh, supra at 245, 263 A.2d at 399. It also embraces the more basic proposition that a political subdivision cannot isolate itself and ignore the housing needs of the areas surrounding it. To implement these concepts, we adopted the "fair share" principle, which requires local political units to plan for and provide land-use regulations which meet the legitimate needs of all categories of people who may desire to live within its boundaries. Mr. Justice O'BRIEN, speaking for this Court in Willistown, stated:

> "The New Jersey Supreme Court, in Southern Burlington County NAACP v. Twp. of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), in discussing a zoning ordinance which provided for a total exclusion of apartment dwellings, stated:
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> 'We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for

low and moderate income housing and its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor. These obligations must be met unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do.' (Emphasis in original).

. . .

Nor are we convinced by Willistown's argument that Chesterdale's development plans would overburden its municipal services. Suburban municipalities within the area of urban outpour must meet the problems of population expansion into its borders by increasing municipal services, and not be the practice of exclusionary zoning."(7)

Id. at 449-450, 341 A.2d at ___.

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(7) Three members of the Commonwealth Court in Willistown reached the same conclusion:

"In pursuing the valid zoning purpose of a balanced community, a municipality must not ignore housing needs, that is, its fair proportion of the obligation to meet the housing needs of its own population and of the region. Willistown Twp. v. Chesterdale Farms, Inc., 7 Pa. Commw. Ct. 453, 469, 300 A.2d 107, ___ 1973)(opinion in support of affirmance), quoting Oakwood at Madison, Inc. v. Twp. of Madison, 117 N.J. Super. 11, 20, 283 A.2d 353, 358 (1971), cert. granted,

Some commentators have expressed concern that judicial adoption of the "fair share" test will thrust courts into the role of super boards of adjustment, thereby usurping a function that is more properly legislative or administrative in nature.(8) Such concern shows a misconception of what we contemplate our role will be. In establishing the "fair share" standard, this Court has merely stated the general precept which zoning hearing boards and government bodies must satisfy by the full utilization of their respective administrative

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62 N.J. 185, 299 A.2d 720 (1973)(emphasis added).

The Court of Appeals of New York has also embraced the view that a zoning ordinance should adequately provide for the housing needs of the particular community and reflect a balanced consideration for regional housing needs. Berenson v. Town of New Castle, 28 N.Y.2d 102, 111, 341 N.E.2d 236, ___, 378 N.Y.S.2d 672, 680-81 (1975). See also, Bristow v. City of Woodhaven, 35 Mich. App. 205, 192 N.W.2d 322 (1971) (invalidating a prohibition on the use of mobile homes).

(8) See, e.g., Ellickson, Suburban Growth Controls: An Economic and Legal Analysis, 86 Yale L. J. 385, 492 (1977); Payne, The Delegation Doctrine in the Reform of Local Government Law, 29 Rutgers L.Rev. 803 (1976). The rejection of the "fair

and legislative expertise. We intend our scope of review to be limited to determining whether the zoning formulas fashioned by these entities reflect a balanced and weighted consideration of the many factors which bear upon local and regional housing needs and development.

The case law of this jurisdiction, as

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share" test by Mr. Justice ROBERTS in his concurring opinion in the instant case appears to be somewhat belated. Mr. Justice ROBERT'S (sic) concurrence in our decision in Willistown cited with approval the opinion of Judge Mencer of the Commonwealth Court in that case. Twp. of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 454, 341 A.2d 466, 471 (1975) (ROBERTS, J., concurring opinion). It is clear from Judge Mencer's opinion in Willistown that he embraced the "fair share" concept. Willistown Twp. v. Chesterdale Farms, Inc., 7 Pa. Commw. Ct. 453, 569, 476, 300 A.2d 107, ___, ___ 1977) Opinion in support of affirmance); see note 7 supra. Furthermore, Mr. Justice ROBERT'S (sic) concern that our partial reliance upon New Jersey's Mount Laurel decision will press this Court into the land use planning business is exaggerated. We are not bound by New Jersey's purported "vast expansion of zoning principles." The "fair share" requirement, as we view it, is merely an analytical strand in the substantial relationship test already employed by this Court in reviewing zoning ordinances. See National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 522, 215 A.2d 597, ___(1965).

developed by this Court as well as the Commonwealth Court, both before and after our decision in Willistown is instructive as to the relevant factors to which a court must look in conducting a review of zoning ordinances which are alleged to be exclusionary. From this body of law a useful analytical method can by synthesized to aid our review. The initial inquiry must focus upon whether the community in question is a logical area for development and population grown. Girsh Appeal, supra; National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment, supra. The community's proximity to a large metropolis and the community's and region's projected population growth figures are factors which courts have considered in answering this inquiry. Waynesborough Corp. v. Easttown Twp. Zoning Hearing Bd., 23 Pa. Commw. Ct. 137, 143, 350 A.2d 895, ___ (1976).

Having determined that a particular community is in the path of urban-suburban growth, the present level of development within the particular

community must be examined.(9) Population density data and the percentage of total undeveloped land and the percentage available for the development of multi-family dwellings are factors highly relevant to this inquiry. Twp. of Willistown v. Chesterdale Farms, Inc., supra; National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment, supra; Waynesborough Corp. v. Easttown Twp. Zoning Hearing Bd., supra; Decaro v. Washington Twp., 21 Pa. Commw. Ct. 252, 254, 344 A.2d 725, ___ (1975).

Assuming that a community is situated in the path of population expansion and is not already highly developed, this Court has, in the past, determined whether the challenged zoning scheme

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(9) Analytically, the present level of community development could be included under the initial inquiry as to whether a community was a local area for population growth and development. Commentators have noted, and probably correctly so, that a particular community might lie along a corridor of population expansion but already be so highly developed that it cannot properly be called a "developing" community. Ackerman, The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform, 1976, U. of Ill. L.R. 1, 13-15. For simplicity we consider the present level of community development as a separate analytical step.

effected an exclusionary result or, alternatively, whether there was evidence of a "primary purpose" or exclusionary intent to zone out the natural growth of population. Twp. of Willistown v. Chesterdale Farms, Inc., supra, citing, National Land and Investment Co., supra; Concord Twp. Appeal, supra. Because the Willistown "fair share" test compels judicial examination of the actual effect of a zoning ordinance upon the availability of multi-family dwellings, evidence of exclusionary motive or intent, whether direct or circumstantial, is not of critical importance.(10) Thus, Willistown marked an implicit departure away from judicial inquiry into the motives underlying a

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(10) In Willistown the only evidence of the township's exclusionary intent was the miniscule fraction (7/10 of 1%) of land available under that ordinance for the development of multi-family dwellings. See Twp. of Willistown v. Chesterdale Farms, Inc. 462 Pa. 445, 450, 341 A.2d 466, 467 (1975). Furthermore the opinion of Judge Mencer of the Commonwealth Court in Willistown emphasized that the exclusionary impact in Willistown was the inadvertent result of the township zoning ordinance . Willistown Twp. v. Chesterdale Farms, Inc., 7 Pa. Commw. Ct. 453, 464-65 & n.5, 300 A.2d 107, ___ ___ & n.5 (1973) (opinion in support of

articular zoning ordinance.(11) Our primary concern is centered upon an ordinance's exclusionary impact.

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affirmance.). It is possible to hypothesize a record replete with evidence of exclusionary intent but void of evidence of exclusionary impact. It would be difficult to conclude that our decision in Willistown forces invalidation of a zoning ordinance which has no exclusionary effect.

Different requirements pertain when it is alleged that a zoning ordinance perpetuates class-based or racially discriminatory housing patterns in violation of the Equal Protection Clause. In wuch a case, proof of this allegation would require evidence of racial or class-based motive. See Arlington Hts. v. Metro. Housing Deve. Co., ___ U.S. ___, 97 S.Ct. 555, 50 L.Ed. 2d 450 (1977). However, the instant case does not raise an equal protection challenge. Finally, it should be noted that the decisions of this Court which have struck down zoning schemes have focused the analysis upon the restriction on or exclusion of certain uses, not on the exclusion of certain classes of people. Twp. of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975) (partial exclusion of multi-family dwellings); Concord Twp. Appeal, 439 Pa.a 466, 268 A.2d 765 (1970) (lot size restriction); Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970) (total exclusion of apartments); Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 425 Pa. 43, 228 A.2d 169 (1967) (exclusion of quarries); Ammon R. Smith Auto Co. Appeal, 423 Pa. 493, 223 A.2d 683 (1966) (ban on flashing signs); National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965) (lot size restrictions); Norate Corp. v. Zoning Bd. of Adjustment, 417 Pa. 397, 207 A.2d 890 (1965) (ban on billboards).

In analyzing the effect of a zoning ordinance, the extend of the exclusion, if any, must be considered. Is there total exclusion of multi-family dwellings, which we disapproved in Girsh Appeal, supra, or is the exclusion partial? If the zoning exclusion is partial, obviously the question of the ordinance's validity is more difficult to answer. In resolving this issue, once again the percentage of community land available under the zoning ordinance for multi-family dwellings becomes relevant.

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(11) Recently the Commonwealth Court noted correctly that exclusionary intent is not an essential element in proving that an ordinance is unconstitutionally exclusionary:

> Finally it is urged that Waynesborough has not shown the "exclusionary intent" by the Township claimed to be a requisite for a holding of unconstitutionality. . . . Intent is not, however, an indispensable element, as in a criminal case. When other facts and circumstances indicate an unreasonable restriction on the use of land for multifamily dwellings, a conclusion that the ordinance is unconstitutional will stand without a finding of intent to exclude.

Waynesborough Corp. v. Easttown Twp. Zoning Hearing Bd., 23 Pa. Commw. Ct. 137, 143, 350 A.2d 895, 898 (1976).

This percentage must be considered in light of current population growth pressure, within the community as well as the region, and in light of the total amount of undeveloped land in the community. Where the amount of land zoned as being available for multi-family dwellings is disproportionately small in relation to these latter factors, the ordinance will be held to be exclusionary.(12)

It now remains to apply this analytical matrix to the facts of the instant case to ascertain if the ordinance in question reflects the proper consideration of the above-discussed factors. There can be little doubt that Upper Providence Township is a logical area for development and popula-

(12) We hasten to emphasize that the factors discussed thus far in no way comprises an exhaustive list. Nor is any one factor necessarily controlling. We anticipate that zoning boards and governing bodies, in the exercise of their special expertise in zoning matters, will develop and consider any number of factors relevant to the need for and distribution of local and regional housing. See Southern Burlington Co. NAACP v. Twp. of Mt. Laurel, 67 N. J. 151, ___ nn. 16-17, 336 A.2d 713, 747, nn. 16-17 (1975) (Pashman, J., concurring).

tion growth. This conclusion is supported by the fact that the township is located a mere twelve miles or so from Philadelphia and is situated at the intersection of two main traffic arties, one of which, Route 1, is a direct link with the city. See Girsh Appeal, supra; National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment, supra; Waynesborough Corp. v. Easttown Twp. Zoning Hearing Bd., supra. The record shows that the township is not a high density population area; roughly one-quarter of the township land is undeveloped. Thus the township's present level of developement does not preclude further developement of multi-family dwellings. See note 9 supra.

The zoning ordinance in question results in a partial exclusion of multi-family dwellings, providing, as it does, 1.14% of the township land for development of multi-family dwellings. It is also significant that multi-family dwellings are only one of more than a dozen other uses permitted on this fraction of land. See note 4 supra. There-

fore, this land is not set aside for the exclusive use of multi-family dwellings; development of such dwellings must compete with the other uses permitted in the B district. The above analysis leads inescapably to the conclusion that the facts of the instant case are legally indistinguishable from those in Willistown.(13) Thus we hold that Upper Providence Township has not provided a "fair share" of its land for development of multi-family dwellings. Twp. of Willistown v. Chesterdale Farm, Inc., supra.

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(13) Appellees properly note that a presumption of validity attaches to any challenged zoning ordinance. Nevertheless, this presumption is rebuttable and was never intended to foreclose full judicial review of constitutional issues. See National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment, supra at 522, 215 A.2d at ___. Where, as in the instant case, the facts show an obvious dearth of land zoned as available for multi-family dwellings, the proponents of the zoning ordinance must put forth adequate justification for this zoning-created scarcity. Appellee's concerns about population burdens, water supply, and the environment, while understandable, do not justify the fraction of land now open for development of multi-family housing. In National Land and Investment Co. v. Easttown Twp. Bd. of Adjustment, supra, this Court was faced with similar proffered justifications and

We therefore direct that zoning approval for appellant's land be granted and that a building permit be issued conditional upon appellant's compliance with the administrative requirements which are consistent with this opinion. Id.

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responded as follows:

> Zoning is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities. It must not and can not be used by those officials as an instrument by which they may shirk their responsibilities. . . .
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> Zoning provisions may not be used, however, to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring.

Id. at 527-28, 215 A.2d at ___(emphasis added)

Appellee-intervener's (sic) assertion that the greatest demand for housing in the township is for single-family homes on one acre lots rather proves too much. One need not probe too deeply into the econimic mechanics of supply and demand to realize that the zoned-in scarcity of land for multi-family dwellings could easily create this type of demand.

Former Chief Justice JONES did not participate in the consideration or decision of this case.

Mr. Justice MANDERINO concurred in the result.

Mr. Justice ROBERTS files a concurring opinion.